BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

AB-9912
File: 02-520605; Reg: 19089554

BOGLE VINEYARDS, INC.,
dba Bogle Winery
49762 Hamilton Road
Clarksburg, CA 95612-5022,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: September 3, 2021
Telephonic

ISSUED SEPTEMBER 13, 2021

Appearances: *Appellant:* John Hinman, of Hinman & Carmichael, LLP, as counsel for Bogle Vineyards, Inc.,

Respondent: Sean Klein, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Bogle Vineyards, Inc., doing business as Bogle Winery (appellant), appeals from a decision of the Department of Alcoholic Beverage Control (Department)[1] suspending its license for 10 days because it furnished, gave, or lent a thing of value to an off-sale retail licensee, in a violation of Business and Professions Code section 25502, subdivision (a)(2).

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[1] The decision of the Department, dated March 23, 2021, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's winegrower license was issued on May 22, 2012. There is no record of departmental discipline against the license. Appellant is a family owned and operated winery that has been in operation for over 50 years. There was no evidence presented of prior discipline against any of the licenses held during its existence. (Findings of Fact (FF), ¶ 3.)

On December 2, 2019, the Department instituted a single-count accusation against appellant, charging that on or about July 12, 2018, appellant, through its agent, did, directly or indirectly, furnish, give, or lend a thing of value, to wit: a Blackstone pizza oven, to an off-sale retail licensee, namely: Raley's, in violation of Business and Professions Code section 25502(a)(2).

At the administrative hearing held on October 21, 2020, documentary evidence was received and testimony concerning the violation charged was presented by Department Agent Bryant Pender. Beau Cornell, appellant's merchandising manager, and Jody L. Bogle, co-owner and director of public relations for Bogle Vineyards, Inc, testified on appellant's behalf.

Testimony established that on July 12, 2018, Agent Pender and another Department agent were on an enforcement assignment in South Lake Tahoe, California. The two agents entered Raley's Store #119, at 4000 South Lake Tahoe Boulevard (a licensed premises with a type 21, off-sale, general license), as part of their assignment. They observed a point of sale display for Bogle Vineyards that prominently featured the infrastructure and pizza stone of a pizza oven on the end cap of one of the supermarket's aisles. (Exhs. D-2, D-3, and L-1.) The oven itself had Bogle Vineyards branding on it and the display had multiple layers of open and unopened cases of Bogle

wines surrounding it. In addition, the display included a Bogle Vineyards branded pennant. (FF ¶ 5.)

The agents returned on July 20, 2018, to discuss the display with store managers. They were informed that the advertising display had been removed by the wine supplier, Young's Market, after being on display for a month. Point of sale displays such as this are provided as loans from the vendor. (FF ¶¶ 6-7.)

On September 12, 2018, Agent Pender spoke with Young's sales representative, Lynne Jackson, who had coordinated the pizza oven display. The materials and idea for the display had come from appellant. Young's received the oven in a shipment after it was purchased by appellant. In preparing the display, Ms. Jackson did not fully assemble the pizza oven and it was not operable in the condition that it was delivered and placed in the display. The propane regulator parts were not assembled or included in the display and she retained those uninstalled parts. The display in Raley's Store #119 was put together on April 28, 2018 and taken down in mid-July. (FF ¶ 8.)

Agent Pender interviewed Beau Cornell, appellant's merchandising manager regarding the pizza oven display at Raley's Store #119 and the larger promotion it was connected to. He also received business records regarding the promotional campaign. The interview and records revealed that appellant bought 250 Blackstone pizza ovens and associated branding items with the Bogle name as part of a point of sale promotional display highlighting pizza month. During the promotion, customers would receive $4 off a purchased pizza with the purchase of a bottle of Bogle wine through a rebate program. Appellant allocated 50 large and 38 small ovens to be used in promotional displays in the 88 Raley's stores in California. (FF ¶¶ 9-10.)

The administrative law judge (ALJ) issued a proposed decision on January 26, 2021, sustaining the accusation and recommending a 10-day suspension. The Department adopted the proposed decision in its entirety on March 18, 2021 and a certificate of decision was issued five days later.

Appellant then filed a timely appeal maintaining that the Department erred as a matter of law for three reasons, namely: (1) there was no violation of section 25502(a)(2) because Bogle complied with rule 106 which permits suppliers to provide items for displays at retail establishments if they are made inoperable; (2) the Department's decision is not supported by substantial evidence; and (3) the decision is invalid because it constitutes an invalid underground regulation in violation of the Administrative Procedures Act (APA). Issues one and two will be discussed together.

DISCUSSION

I

SECTION 25502(a)(2)

Business and Professions Code section 25502(a)(2) provides:

> (a) No manufacturer, winegrower, manufacturer's agent, California winegrower's agent, rectifier, distiller, bottler, importer, or wholesaler, or any officer, director, or agent of any such person, shall, except as authorized by this division:
>
> [¶ . . . ¶]
>
> (2) Furnish, give, or lend any money or other thing of value, directly or indirectly, to, or guarantee the repayment of any loan or the fulfillment of any financial obligation of, any person engaged in operating, owning, or maintaining any off-sale licensed premises.

Rule 106 provides in pertinent part:

> (a) No licensee shall, directly or indirectly, give any premium, gift, free goods, or other thing of value in connection with the sale, distribution, or sale and distribution of alcoholic beverages, and no retailer shall, directly

> or indirectly, receive any premium, gift, free goods or other thing of value from a supplier of alcoholic beverages, except as authorized by this rule or the Alcoholic Beverage Control Act.
>
> [¶ . . . ¶]
>
> (4) A supplier may furnish, give, lend, rent or sell promotional materials for alcoholic beverages sold by him to a retailer for use within off-sale premises, **so long as the promotional material has no intrinsic value other than as advertising**, in the same manner and under the same terms and conditions as the supplying of signs or displays pursuant to this rule.

(Cal.Code Regs., Tit. 4, §106, emphasis added.)

Appellant contends the decision is wrong as a matter of law. The parties agree that the pizza oven was placed in the Raley's display by Young's Market, and that the oven was made inoperable (or non-functional) by not installing propane regulator parts which were retained by Ms. Jackson. There is no evidence in the record that Raley's or any of its agents or employees retained, utilized, or reassembled the pizza oven or any of its components after it was used in the advertising display. Furthermore, neither the statute nor the rule require a contract stating that advertising displays will be returned to the manufacturer or distributer. (ARB at pp. 6; 9.)

The Department contends that the pizza oven was a thing of value for three reasons, to wit: (1) the oven *could have been* made operational by reassembling the parts retained by Ms. Jackson or by attaching compatible third-party parts, (2) the oven contained a pizza stone, which someone *could have* removed and used separately, and (3) there was no contract stating that the pizza oven was to be returned to appellant. (RRB at p. 7.)

The issue before the Board in this matter is not a question of fact, where we are bound by the ALJ's findings, but is, instead, a question of law — thus, the Board is not

bound by the ALJ's assumptions and findings, but considers the question *de novo*:

> It is well settled that the interpretation and application of a statutory scheme to an undisputed set of facts is a question of law [citation] which is subject to de novo review on appeal. [Citation.] Accordingly, we are not bound by the trial court's interpretation. [Citation.]

(*Rudd v. California Casualty Gen. Ins. Co.* (1990) 219 Cal.App.3d 948, 951-952 [268 Cal.Rptr. 624].)

> As the matter below was submitted on stipulated facts, the trial court was presented with purely legal questions and its statement of decision is not binding on us. [Citation.] We are thus free to draw our own conclusions of law from the undisputed facts.

(*S. v. City of San Diego* (1989) 209 Cal.App.3d 893, 899 [257 Cal.Rptr. 578].) The question for the Board in this matter is whether, as a matter of law, the plain language of section 25502(a)(2) has been violated in this instance.

> The posture of a case in which the sufficiency of the evidence is not disputed is identical to that where the facts before the administrative agency are uncontradicted. In such a case the only issue concerns the conclusions to be drawn from the pertinent facts; the trial court's determination is therefore a question of law. [Citation.] On appeal the court's review is not circumscribed by the substantial evidence rule, but amounts to an inquiry of law.

(*Mixon v. Fair Employ. & Hous. Comm.*) (1987) 192 Cal.App.3d 1306, 1311 [237 Cal.Rptr. 884].)

Section 25502 is one of several "tied-house" statutes. As one court informs us of the "purposes" behind the tied-house laws:

> Tied-house statutes are so named because they were enacted to prevent the return of saloons operated by liquor manufacturers, a practice that had been common in the early 1900's. (*Actmedia, Inc. v. Stroh* (9th Cir. 1986) 830 F.2d 957, 959 (*Actmedia*).) The California Supreme Court has explained that the Legislature enacted the tied-house provisions after the repeal of the 18th Amendment to prevent two particular dangers that had been common before Prohibition. (*California Beer Wholesalers Assn., Inc. v. Alcoholic Bev. etc. Appeals Bd.* (1971) 5 Cal.3d 402, 407 [96 Cal.Rptr. 297, 487 P.2d 745] (*California Beer Wholesalers*).) First, the

> Legislature aimed to prevent "the ability and potentiality of large firms to dominate local markets through vertical and horizontal integration." (*Ibid.*) Second, the Legislature wanted to curb "the excessive sales of alcoholic beverages produced by the overly aggressive marketing techniques of larger alcoholic beverage concerns." (*Ibid.*) The Legislature established a triple-tiered distribution and licensing scheme for alcoholic beverages. (*Ibid.*) Manufacturers were to be separated from wholesalers, and wholesalers were to be separated from retailers. (*Ibid.*) "In short, business endeavors engaged in the production, handling, and final sale of alcoholic beverages were to be kept 'distinct and apart.'" (*Ibid.*, quoting 25 Ops.Cal.Atty.Gen. 288, 289 (1955).) The Legislature intended that firms operating at one level of distribution "were to remain free from involvement in, or influence over, any other level." (*California Beer Wholesalers*, *supra*, 5 Cal.3d at p. 408.)
>
> The drafters of the tied-house provisions believed that if manufacturers and wholesalers were allowed to gain influence through economic means over retail establishments, they would then use that influence to obtain preferential treatment for their products and either the exclusion of or less favorable treatment for competing brands. (*Actmedia*, *supra*, 830 F.2d at p. 966.) Legislators were concerned that such practices would lead to an increase in alcohol consumption as retailers adopted aggressive marketing techniques to encourage customers to purchase the alcoholic beverages they stocked. (*Ibid*.; *California Beer Wholesalers*, *supra*, 5 Cal.3d at p. 407, fn. 7.)

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Schieffelin*) (2005) 128 Cal.App.4th 1195, 1207 [27 Cal.Rptr.3d 766].)

The scope of the Appeals Board's review is limited by the California Constitution, statute, and case law. In reviewing the Department's decision, the Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the factual findings and legal conclusions. The Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing. (Cal. Const., art. XX, §§ 22;

Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].) As one court explains:

> If the Department's administrative action declares or applies legal rules, or sets forth conclusions of law which are drawn from adjudicated or undisputed facts, it is subject to review only for insufficiency of the evidence, excess of jurisdiction, errors of law, or abuse of discretion. [T]he discretion exercised by the Department is not absolute but must be exercised in accordance with the law, and the provision that it may revoke [or deny] a license "for good cause" necessarily implies that its decisions should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare or morals.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Deleuze*) (2002) 100 Cal.App.4th 1066, 1072 [123 Cal.Rptr.2d 278], citations and internal quotation marks omitted.) This same standard applies to review of the Department's decision to discipline a license. (*Ibid*.)

When it comes to this Board's review of the evidence supporting the factual findings of the decision below, we must adhere to the "substantial evidence" standard:

> There are two aspects to a review of the legal sufficiency of the evidence. First, one must resolve all explicit conflicts in the evidence in favor of the respondent and presume in favor of the judgment all *reasonable* inferences.[fn] [Citation.]
>
> Second, one must determine whether the evidence thus marshaled is substantial. While it is commonly stated that [an appellate court's] "power" begins and ends with a determination that there is substantial evidence [citations],[fn] this does not mean [it] must blindly seize any evidence in support of the respondent in order to affirm the judgment. The Court of Appeal "was not created . . . merely to echo the determinations of the trial court. A decision supported by a mere scintilla of evidence need not be affirmed on review." (*Bowman v. Bd. of Pension Comrs.* (1984) 155 Cal.App.3d 937, 944 [202 Cal.Rptr. 505].) "[I]f the word 'substantial' [is to mean] anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with 'any' evidence. It must be reasonable . . . , credible, and of solid value . . . ." (*Estate of Teed* (1952) 112 Cal.App.2d 638, 644 [247 P.2d 54].)

> The ultimate determination is whether a *reasonable* trier of fact could have found for the respondent based on the *whole* record. [Citation.] While substantial evidence may consist of inferences, such inferences must be "a product of logic and reason" and "must rest on the evidence" [citation]; inferences that are the result of mere speculation or conjecture cannot support a finding [Citations].

(*Kuhn v. Dept. of Gen. Services* (1994) 22 Cal.App.4th 1627, 1632-1633 [29 Cal.Rptr.2d 191], emphasis in original.)

In the accusation, the Department alleges:

> On or about July 2, 2018, respondent-licensee, by and through its officer(s), agents(s), or employee(s) did, directly or indirectly, furnish, give, or lend a thing of value, to wit: Blackstone pizza oven, to an Off-Sale Retail Licensee, namely: RALEYS (21-50028), in violation of Business and Professions Code Section 25502(a)(2).

(Exh. 1.) Appellant contends the pizza oven was not a "thing of value" because it was non-operational, and thus had no intrinsic value other than as advertising — as permitted by rule 106.

The ALJ found that appellant furnished Raley's a "thing of value" based on actions which *might have happened:*

> 9. Even absent the parts that were retained by Jackson, the oven had value because the pizza stone was included in the display setup and the infrastructure of the baking area was intact. All that would be needed to have a functioning oven would be for someone to purchase an aftermarket propane regulator tube. Or, the retailer could have just asked for the remaining parts and nothing in the campaign parameters established by the Respondent would have prohibited this. Under the circumstances, the Respondent, a winegrower. furnished or gave a "thing of value" to an off-sale licensed premises in violation of Section 25502(a)(2).

(Conclusions of Law, ¶ 9.)

We find this result absurd. In essence, the decision finds that the display was a "thing of value" because of events which ***could*** have taken place, but which did not. As noted above, " inferences that are the result of mere speculation or conjecture cannot

support a finding." (*Kuhn, supra,* at p. 1633 There was no evidence presented in the record that any of the actions contemplated by the ALJ ever occurred — Raley's did not reassemble the oven or remove the pizza stone — nor is there a requirement in the statute that a contract exist to make sure advertising displays are returned. We question the agent's overzealousness in recommending this matter for an accusation.

Future possible conduct is ***not*** the conduct prohibited by section 25502. Thankfully, the legislature does not permit the prosecution of licensees for violations which have not yet occurred, simply because it can be imagined that the addition of certain potentialities would then constitute a violation.

As in any case involving statutory interpretation,

> [O]ur fundamental task is to determine the Legislature's intent so as to effectuate the law's *purpose*. (*People v. Lewis* (2008) 43 Cal.4th 415, 491 [75 Cal.Rptr.3d 588, 181 P.3d 947].) "We begin with the text of the statute as the best indicator of legislative intent" (*Tonya M. v. Superior Court* (2007) 42 Cal.4th 836, 844 [69 Cal.Rptr.3d 96, 172 P.3d 402), but we may reject a literal construction that is contrary to the legislative intent apparent in the statute or that would lead to absurd results (*Ornales v. Randolph* (1993) 4 Cal.4th 1095, 1105 [17 Cal.Rptr.2d 594, 847 P.2d 560]).

(*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 27 [109 Cal.Rptr.3d 329], emphasis added.) After all, "if a statute is to make sense, it must be read in the light of some assumed *purpose*. A statute merely declaring a rule, with no purpose or objective, is nonsense." (Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed* (1950) 3 Vand.L.Rev. 395, 400, emphasis added, reprinted in Singer, *Statutes and Statutory Construction* (6th ed. 2000) § 48A:08, p. 639.) It is through this lens that the Board must scrutinize the Department's interpretation.

The Department's interpretation and application of section 25502(a)(2) in this case is not conducive to the statute's purpose — that is, to prevent manufacturers and distributors from exercising undue influence over retailers and preventing actions which seek preferential treatment for their products. Instead it relies exclusively on pure conjecture to misapply the spirit and letter of section 25502(a)(2). Possibilities are not evidence; they are speculation, and cannot support findings or conclusions of law.

The burden of persuasion at the administrative hearing is the preponderance of evidence, and the Department's initial burden of producing evidence is to make a *prima facie* case — that is, to produce sufficient evidence to support a finding in its favor in the absence of rebutting evidence. (See *The Von's Corp.* (2002) AB-7819.) Insufficient evidence was presented in this matter to support the findings sustaining this accusation.

> [T]he discretion to be exercised by the department under section 22 of Article XX of the Constitution "is not absolute but must be exercised in accordance with the law, and the provision that it may revoke [or deny] a license 'for good cause' necessarily implies that its decisions should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare or morals."

(*Martin v. Alcoholic Bev. Control Appeals Bd.* (1961) 55 Cal.2d 867, 876 [13 Cal.Rptr. 513], quoting *Weiss v. State Bd. of Equalization* (1953) 40 Cal.2d 772, 775 [256 P.2d 1].)

The Department may not act arbitrarily in exercising its discretion (*Martin, supra*, at p. 876), and pure speculation is the very definition of arbitrary. Speculation about things that could have happened is not evidence. Findings must be supported by substantial evidence which is "reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case." (*Toyota, supra* at p. 871.)

The entirely speculative findings in the Department's decision about things that could have happened do not meet this substantial evidence standard. We therefore reverse.

II

UNDERGROUND REGULATION

Appellant contends that the Department's determination as to what constitutes a thing of value constitutes an underground regulation, in violation of the APA. (AOB at p. 13.)

This issue was not raised at the administrative hearing. It is settled law that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (*Araiza v. Younkin* (2010) 188 Cal.App.4th 1120, 1126-1127 [116 Cal.Rptr.3d 315]; *Hooks v. Cal. Personnel Bd.* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Bd. of Med. Examiners* (1978) 81 Cal.App.3d 564, 576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Harris v. Alcoholic Bev. Control Appeals Bd.* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].)

We decline to address this issue here because we reverse on other grounds. However, we note that the Department's finding — that a violation of section 25502 was supported by the lack of a contract, detailing the return of the display materials — is found nowhere in section 25502, and would constitute an enlargement of rule 106 in violation of the procedures required by the APA.

ORDER

The decision of the Department is reversed.[2]

SUSAN BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
SHARLYNE PALACIO, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[2] This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.

APPENDIX

BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE ACCUSATION AGAINST:

BOGLE VINEYARDS, INC.
BOGLE WINERY
49762 HAMILTON RD.
CLARKSBURG, CA 95612-5022

WINEGROWER - LICENSE

Respondent(s)/Licensee(s)
Under the Alcoholic Beverage Control Act

TRADE ENFORCEMENT UNIT

File: 02-520605

Reg: 19089554

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on March 18, 2021. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after May 3, 2021, a representative of the Department will contact you to arrange to pick up the license.

Sacramento, California

Dated: March 23, 2021

Matthew D. Botting
General Counsel

BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE ACCUSATION AGAINST:

Bogle Vineyards, Inc. DBA: Bogle Winery 49762 Hamilton Rd. Clarksburg, California 95612-5022	}	File: 02-520605 Registration: 19089554
	}	License Type: 02
	}	Page Count: 123
Respondent	}	Reporter: Danielle Cruzat-CSR # 13650 iDepo Reporters
Type 2 Winegrower License	}	
	}	**PROPOSED DECISION**

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter, via videoconference, on October 21, 2020.

Sean Klein, Attorney, represented the Department of Alcoholic Beverage Control (Department).

Gillian Garrett, Attorney, represented the Respondent, Bogle Vineyards, Inc. (Respondent).

In a one count Accusation, the Department seeks to discipline the Respondent's license on the grounds that, on or about July 12, 2018, the Respondent-Licensee, by and through its officer(s), agent(s), or employee(s) did, directly or indirectly, furnish, give, or lend a thing of value, to wit: a Blackstone pizza oven, to an off-sale retail licensee, namely: Raley's (21-50028) in violation of Business and Professions Code section 25502(a)(2).[1]

The Department further alleged that there is cause for suspension or revocation of the license of the Respondent in accordance with section 24200 and sections 24200(a) and (b). The Department further alleged that the continuance of the license of the Respondent would be contrary to public welfare and/or morals as set forth in Article XX, Section 22 of the California State Constitution and sections 24200(a) and (b). (Exhibit D-1)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the October 21, 2020 hearing. The matter was initially argued on October 21, 2020. Additional briefing by both parties was submitted and received for consideration between November 16, 2020 and December 1, 2020. (Exhibits D-9, D-10 and L-4)

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[1] All statutory references are to the Business and Professions Code unless otherwise noted. All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

FINDINGS OF FACT

1. The Department filed the accusation on December 2, 2019.

2. The Department issued the most recent license held, a type 2, winegrower's license to the Respondent for the above-described location on May 22, 2012.

3. There is no record of prior departmental discipline against the Respondent's license. The Respondent is a family owned and operated winery that has been in operation for approximately 40 years. There was no evidence of prior discipline against any of the licenses held during its existence.

4. On July 12, 2018 Department Agent B. Pender (Pender) and another Department agent were on an enforcement assignment in South Lake Tahoe, California. Pender and the other agent entered Raley's Store #119 at 4000 South Lake Tahoe Blvd. as part of their assignment. Raley's Store #119 was a licensed premises with a type 21, off-sale, general license. (Exhibit D-3)

5. While walking through the alcoholic beverage displays in Raley's Store #119, Pender observed a point of sale display for Bogle Vineyards that prominently featured the infrastructure and pizza stone of a pizza oven. The pizza oven appeared to be designed to be used outdoors with a portable propane tank as a fuel source. Upon closer examination, the tubing and regulator that would be used to connect the oven to a propane tank appeared to have been removed from the display. The display was on the end cap of one of the supermarket's aisles closest to the northern entrance. The oven itself had Bogle Vineyards branding on it and the display had multiple layers of open and unopened cases of Bogle wines surrounding it. In addition, there was a Bogle Vineyards branded pennant to the direct right of the pizza oven display. The overall effect was a unified display of the Bogle Vineyards wines that were being sold at Raley's Store #119. Pender documented his observations in three photographs that he took of the display on July 12, 2018. (Exhibits, D-2, D-3 and L-1)

6. On July 20, 2018 Pender and the other Department agent returned to discuss the Bogle display and other displays that had caught their attention. Pender observed that the Bogle display had been removed. Pender spoke with two Raley's Store #119 representatives. Store manager Constance Marie Cummins (Cummins) and liquor manager Violeta Sanchez (Sanchez). Cummins texted the district manager who instructed her that all of the point of sale displays are loans from the vendors. (Exhibit D-3)

7. Pender spoke with Sanchez in more detail about the Bogle display. Sanchez confirmed that the display had been removed recently by the supplier after being on display for over a month. The display had come from Young's Market (Young's), their wine supplier. Young's had type 9 and type 12 (importer), and type 17 and 18 (wholesaler) licenses with the Department during the period at issue. Sanchez confirmed that there was no written contract, agreement or loan of the

pizza oven display addressing what was to happen with the pizza oven parts used in the display after the promotion ran its course. (Exhibit D-3)

8. On September 12, 2018 Pender spoke with Young's sales representative Lynne Marie Guerra Jackson (Jackson). Jackson was the Young's representative that coordinated the pizza oven display observed by Pender on July 12, 2018. The materials and idea for the display had come, unsolicited, from the Respondent. Young's had received the oven in a shipment after it was bought by the Respondent. Jackson, in preparing the display, had not fully assembled the pizza oven and it was not operable in the condition that it was delivered and placed in the display by Jackson. Young's had been sent the oven in its entirety by the Respondent. Jackson did not attach the propane regulator parts sent with the rest of the oven and she retained those parts before setting up the display at Raley's Store #119. The display in Raley's Store #119 was put together on April 28, 2018 and taken down in mid-July. (Exhibit D-3)

9. Pender interviewed Beau Cornell, (Cornell) the merchandising manager of the Respondent regarding the Bogle pizza oven display at Raley's Store #119 and the larger promotion it was connected to. Pender also received business records regarding the promotional campaign by the Respondent. The interview and the records revealed that the Respondent bought 250 Blackstone pizza ovens and associated branding items with the Bogle name from Insight Resource Group (Insight) on February 22, 2018 for a total of $81,734.02. (Exhibits D-3 and D-6) Individual large pizza oven units, like the one used in Raley's Store #119, cost $280.32 each. (Exhibit D-6) The idea was to use the ovens as point of sale promotional displays highlighting pizza month. Customers would get $4 off a purchased pizza with the purchase of a bottle of Bogle wine through a rebate program that was part of the campaign. (Exhibit D-3)

10. From the 250 units bought from Insight, the Respondent allocated 50 large and 38 small ovens to be used in promotional displays in the 88 Raley's stores in California. Raley's Store #119 was one of those stores. The costs of the pizza ovens bought from Insight was paid by the Respondent. The Respondent also facilitated the shipping of the pizza ovens to Young's so that their sales representatives could coordinate the approval and installation of displays at the Raley's stores throughout California, including Raley's Store #119. The pizza ovens were sent from the Respondent to Young's with all of the components intact. No parts were removed, by the Respondent, to render them inoperable, prior to their shipment to Young's for the assembly of the displays in retail stores like Raley's Store #119. (Exhibits D-3 and D-6)

11. Prior to the setting up of the displays, the Respondent developed a guidance packet for the promotional campaign that appeared to be for the use of Bogle employees, like Cornell, who were directly involved in the campaign, and their wholesaler, Young's. Some of the pages of the packet outlined the timing and purpose of the promotional campaign. Other pages gave visual examples of how to set up the displays with the pizza ovens. The last page of the packet was entitled "Dealer Loader Regulations" and it referenced that both the large and small ovens cost less than $300. After this notation, the page then stated

> "[i]f buyers are still weary, (sic) FYI the ovens "don't work" without propane AND the regulator can be removed, if needed."[2]

A copy of the packet was received from Raley's by the Department during discovery in this matter. (Exhibits D-3 and D-5)

10. Cornell understood that it was Jackson's responsibility to take the display down at the end of the promotional campaign in Raley's Store #119, but he did not provide any written instructions to Jackson, Young's or the employees of Raley's Store #119 that they were to return the pizza oven components after the campaign. Cornell did not know, specifically, when the display was taken down, but he was aware that it had been removed prior to the agents' visit on July 20, 2018. He did not know what had become of the pizza oven components after the promotional display was disassembled. The cost of the promotional campaign, in relation to the pizza ovens and branding items purchased from Insight, was borne by the Respondent. There were no written contracts, agreements or instructions sent to Young's or retailers like Raley's Store #119 regarding who was to retain the components of the pizza oven that were used in the display after the promotional campaign had run its course. Raley's Store #119 and the other Raley's stores that participated in the campaign were not required to pay for or rent the pizza oven displays that were set up in their stores during the promotional campaign.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Section 25502(a)(2) provides that "[n]o manufacturer, winegrower, manufacturer's agent, California winegrower's agent, rectifier, distiller, bottler, importer, or wholesaler, or any officer, director, or agent of any such person shall . . . [f]urnish, give, or lend any money or other thing of value, directly or indirectly, to, or guarantee the repayment of any loan or the fulfillment of any financial obligation of, any person engaged in operating, owning, or maintaining any off-sale licensed premises."

4. Section 25600(a)(1) provides, in part, that "[n]o licensee shall, directly or indirectly, give any premium, gift, or free goods in connection with the sale or distribution of any alcoholic beverage, except as provided by rules that shall be adopted by the department to implement this section or as authorized by this division."

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[2] In the context of the communication, it appears the Respondent intended to use the word "wary" not "weary". The quotation marks around "don't work" are in the original.

5. Rule 106(a) provides that "[n]o licensee shall, directly or indirectly, give any premium, gift, free goods, or other thing of value in connection with the sale, distribution, or sale and distribution of alcoholic beverages, and no retailer shall, directly or indirectly, receive any premium, gift, free goods or other thing of value from a supplier of alcoholic beverages, except as authorized by this rule or the Alcoholic Beverage Control Act."

6. With respect to the Accusation, cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) on the basis that, the Respondent-Licensee, by and through its officer(s), agent(s), or employee(s) did, directly or indirectly, furnish, give, or lend a thing of value, to wit: a Blackstone pizza oven, to an off-sale retail licensee, namely: Raley's (21-50028) in violation of Business and Professions Code section 25502(a)(2). (Findings of Fact ¶¶ 4-10)

7. In this matter, it was established that the Respondent purchased intact pizza ovens to be used as displays in a promotional campaign at various Raley's supermarkets in California. The oven of the type ultimately used at Raley's Store #119 was valued at $280.32. The Respondent took no steps to disable or render the pizza ovens valueless prior to sending the units to Young's, the wholesaler they utilized to facilitate the sales of Bogle wines in Raley's California off-sale locations. The Respondent then communicated with Young's to work with Raley's retailers, including Raley's Store #119 in South Lake Tahoe, to install these displays using the pizza ovens as a centerpiece in the display. The guidance packet regarding the promotional campaign referenced that the pizza ovens "don't work" without propane and referenced removing the regulator, "if needed." When Jackson installed the pizza oven at Raley's Store #119, she did not install the propane tank regulator tubing, but she did assemble the infrastructure of the pizza oven, including the pizza stone, as evidenced by the pictures of the display taken by Pender. (Findings of Fact ¶¶ 4-10)

8. There were no contracts or agreements from the Respondent for the sale or rental of the pizza oven components to the retailer, Raley's Store #119. The Respondent paid for the pizza ovens, so all of the components that were placed in the display were received without cost to the retailer. Further, the Respondent did not establish any parameters for the return of the pizza oven components after the promotional campaign was done. No consequences were established if the retailer decided to keep the display at the end of the promotional campaign. The Respondent did not impose any restrictions on Young's preventing it from reuniting the parts that were not installed with the rest of the components that were used in the display so that the oven was made whole again for the retailer's use. While the evidence does not support that there was an *intentional* effort on the part of the Respondent to "gift" these ovens to retailers in exchange for prominent displays in their stores, the net result is that the campaign resulted in an unlawful furnishing in violation of the statute alleged in the Accusation.

9. Even absent the parts that were retained by Jackson, the oven had value because the pizza stone was included in the display setup and the infrastructure of the baking area was intact. All that would be needed to have a functioning oven would be for someone to purchase an aftermarket propane regulator tube. Or, the retailer could have just asked for the remaining parts

and nothing in the campaign parameters established by the Respondent would have prohibited this. Under the circumstances, the Respondent, a winegrower. furnished or gave a "thing of value" to an off-sale licensed premises in violation of Section 25502(a)(2).

10. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

PENALTY

Rule 144 does not specify a penalty for the free-goods violation alleged in the Accusation. The allegation, in general, and the specific circumstances of this case, do not involve moral turpitude so this offense would correlate to offenses that call for 10-15 day suspensions, absent aggravation or mitigation. While there is only one allegation in this case, the facts arose from a promotional campaign that was implemented in 88 off-sale locations in California. As such, this violation was part of a continuous course of conduct. This is a factor in aggravation.

Although ignorance of the law is no excuse, the violation at issue here appears to be unintentional and the product of a failure to implement appropriate controls over a display item with a significant intrinsic value. There does not appear to be an intent on the part of the Respondent to pass along a thing of value in exchange for a more favorable display than the Respondent's competitors. The Respondent has responsibly operated under the most recent license and in its decades of being a Department licensed winemaker. These are appropriate factors in mitigation.

The penalty recommended herein complies with rule 144.

ORDER

The Respondent's type 2 winegrower's license is hereby suspended for a period of 10 days.

Dated: January 26, 2021

Alberto Roldan
Administrative Law Judge

☑ Adopt

☐ Non-Adopt: _____

_____

By: _____

Date: 03/18/21